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December 18, 2003

Public Service Commission
211 Sower Boulevard
PO Box 615
Frankfort, KY 40602
ATTN: Thomas M. Dorman, Executive Director

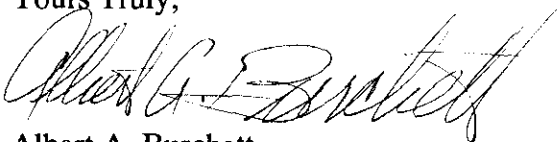
RE: Case 2003-00228
Matrix Energy, LLC For Determination of Retail Electric Supplier

Dear Mr. Dorman:

Enclosed please find original and ten (10) copies of "Big Sandy's" Motion to Dismiss
and original and ten (10) copies of "Big Sandy's" Memorandum Brief for filing.

Thank You.

Yours Truly,



Albert A. Burchett

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

10-13-03

In the Matter of:

MATRIX ENERGY, LLC)	
FOR DETERMINATION OF)	CASE NO. 2003-00228
RETAIL ELECTRIC SUPPLIER)	

**MOTION OF BIG SANDY RURAL ELECTRIC
COOPERATIVE CORPORATION TO DISMISS THE APPLICATION**

Big Sandy Rural Electric Cooperative Corporation ("Big Sandy") for its motion to dismiss the application of Matrix Energy, LLC ("Matrix") For Determination of Retail Electric supplier states as follows:

1. "Big Sandy", by counsel, moves for an order dismissing the Application on the grounds that "Matrix" does not have standing to bring this action and/or is not the real party in interest and cannot, therefore, prosecute this action.

2. The factual and legal matters supporting this motion are contained in the "Memorandum Brief of Big Sandy filed herewith.

WHEREFORE, "Big Sandy" requests the proper order to the Commission.

Respectfully Submitted,

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By:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, First Class postage prepaid to the following on December 18, 2003 upon:

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

00228	MATRIX ENERGY, LLC) FOR DETERMINATION OF) RETAIL ELECTRIC SUPPLIER)	CASE NO. 2003-
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**MEMORANDUM BRIEF OF BIG SANDY RURAL ELECTRIC
COOPERATIVE CORPORATION**

DEC 23 2003

Big Sandy Rural Electric Cooperative Corporation ("Big Sandy") for its Hearing Brief states as follows:

INTRODUCTION

On June 12, 2003 Matrix Energy, LLC ("Matrix") filed application before the Public Service Commission (PSC) requesting an order authorizing Kentucky Power Company d/b/a American Electric Power ("AEP") to solely provide electric power to a coal mine whose entrance is entirely located in "Big Sandy's" certified territory.

MATRIX'S APPLICATION

The application states that "Matrix" is engaged in the business of coal mining. The application also alleges, in effect, that "AEP" has the only existing infrastructure in this remote area, making "AEP's" existing facilities closest to the Mine; That therefore, its existing facilities are available to provide adequate and dependable service; That "Big Sandy"

proposes to use "AEP's" facilities in part to provide service to the Mine; That allowing "AEP" to provide service to the entire mine will eliminate duplication of service facilities; That although service can be provided to the initial phase of the project from "Big Sandy" service territory, this service cannot be used to serve the later phases, which must be served through the bore holes in "AEP" certified territory. Thus, requiring Applicant to take its initial service from "Big Sandy" will result in redundancy of facilities.

RESPONSES TO APPLICATION

"AEP's" response states, in effect, that the mine entrance will be located in the "Big Sandy" service territory near the boundary line between the service territories of "Big Sandy" and "AEP"; That with "Big Sandy" consent, "AEP" is providing three phase electric service to the "Matrix" mine in connection with the preparation of the proposed mine entrance; That the point at which "AEP's" 69 kV Dewey-Inez transmission line will be tapped to provide service to the mining facility is located approximately 1.5 miles from the mine entrance; That "AEP" has adequate and dependable transmission facilities in the area capable of being used to provide to "Matrix" retail electric service; That allowing "AEP" to provide service to the entire "Matrix" mine will prevent a duplication of facilities.

"Big Sandy's" response states, in part, that on January 3, 2002 Mr. Ted McGinnis of Beechfork Processing Company ("Beechfork") requested "Big Sandy" to provide electrical service for a new shaft mine located in

Johnson County, Kentucky. "Beechfork" estimated the mine load to be 5,000-10,000 KW with full power needed by January, 2003. "Beechfork" offered to provide easements and site preparation for the temporary substation to serve the mine. "Big Sandy" advised that East Kentucky Power Cooperative ("EKPC") would be their source of the power. "EKPC" informed "Beechfork" that it would tap "AEP's" transmission line and build 1.6 miles of transmission line to the new substation located near the main entrance to the mine. "EKPC" advised that "AEP" would perform a System Impact Study ("SIS") and a Facilities Study ("FS") and "Beechfork" agreed and requested "Big Sandy" to proceed with the necessary work to provide the retail electric service. "Big Sandy" and "EKPC" agreed to do so.

Neither "Beechfork" or "Matrix" requested temporary service from "Big Sandy" for construction of the mine entrance. Likewise, "Big Sandy" never consented or agreed for "AEP" to provide this temporary service located on "Big Sandys" exclusive service territory. If "AEP" is providing such service, as alleged, then "AEP" is trespassing on "Big Sandys" exclusive right and service territory. "Big Sandy" requests an order from the commission enjoining "AEP" from furnishing electric service related to the preparation of the mine entrance and awarding damages to "Big Sandy" for willful trespass.

The mine portal is, or will be, located entirely in the "Big Sandy" certified territory. Under KRS 278.016-018 and all other applicable law, "Big Sandy" has the exclusive right to supply electric service to the mining

company for its mining operations at the aforementioned location and for its future development. An order should be entered granting "Big Sandy" this service right and "AEP" should be enjoined from furnishing electric service at the mine portal.

"Big Sandy" alleged that "AEP" has agreed to an interconnection with its 69kV Line. Either electric supplier is required to build 1.5-1.6 mile of transmission line and a new substation to the mine portal. As neither supplier has existing distribution lines capable of providing dependable retail electric service for the "Matrix" mine, the adequacy and dependability of the distribution lines is equal for both suppliers.

That there will not be a duplication of electric lines and facilities supplying either the portal or the bore holes. That the criteria in KRS 278.017(3) is equal.

That "Big Sandy's" exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory should prevail as the .017(3) criteria is equal.

That Under 278.018 "Big Sandy" requests the Commission for an order permitting it to extend its facilities through the certified territory of "AEP", if such extension is necessary to supply electric service at the bore holes.

EVIDENCE

Errol K. Wagner, with a background in accounting, is Director of Regulatory Services for "AEP" (Direct Testimony ["DT"], page {p.}1). He testified that "Matrix" would not be served from any of "AEP's" existing

distribution facilities in the area of the Matrix mine ("DT", p.3). He further testified that the Matrix mine would be served directly from "AEP" transmission facilities by means of a 69kV tap line ("DT", p.3).

Mr. Wagner emphasized his position by testifying:

"...Without regard to whether the company or Big Sandy RECC serves the entire Matrix Mine, or whether the mine is split between the two companies, the Matrix Mine will be served from the company's Dewey-Inez 69kV line..." ("DT", p.4).

Again, Mr. Wagner reiterated his position by testifying:

"...The Company has both distribution and transmission facilities located within the Matrix mine area. The transmission facilities include the Company's Beaver Creek-Dewey 138 kV line, which spans the Matrix mine area north to south and the Dewey-Inez 69 kV line that is located approximately 1.6 miles north of the Matrix mine area. As indicated earlier in my testimony, the Dewey-Inez 69 kV line will be tapped to provide service to the Matrix mine..." ("DT", p.4).

Mr. Wagner testified that "AEP's" distribution facilities in the area were placed into service shortly after late 1950, ("DT", p.3).

Finally, Mr. Wagner testified,"... Duplication of some facilities will occur if service is split between Big Sandy RECC and AEP..." ("DT", p.9).

Gregory L. McKinney, a licensed professional engineer with a degree in Electrical Engineering, testified as follows:

"...Paul Horn has assumed that only AEP can provide him with 34.5 kV service and only AEP will construct or allow Beechfork to construct 34.5 kV to the boreholes. The fact of the matter is, EKPC/Big Sandy could and

would be willing to supply 34.5 kV service to the entrance of the mine as well as to the boreholes. There is absolutely no reason that I can think of for duplication of facilities regardless if the load is served from one provider or two providers. Either company at whatever voltage requested by Beechfork can provide the same transmission and substation facilities. Furthermore, each company, to allow for one company to serve the mine entrance and one company to serve the boreholes, can share common transmission and substation facilities.

* * *

EKPC would make a voltage transformation from 69 kV to 34.5 kV either adjacent to AEP's 69 kV line or at the mine entrance, whichever Beechfork prefers. If Beechfork prefers the substation to be located at the mine entrance, EKPC would be required to build a 1.6 mile 69kV line from AEP'S 69kV line. Once that decision is made, the next question is where does the change of ownership take place. 34.5 kV lines can be constructed from the 69-34.5 kV substation to different locations (entrance, boreholes, etc), as required by Beechfork. EKPC/Big Sandy can own the 34.5 kV feeders or Beechfork can own the 34.5 kV feeders..." ("DT", p.6-7).

Bruce A. Davis, Jr., President / General Manager of "Big Sandy" testified that "Big Sandy" never gave "AEP" or "Matrix" verbal or written consent for "AEP" to provide "Matrix" with temporary electric service in "Big Sandy's" certified territory ("DT", p.2-3) David Estepp, "Big Sandy" Manager of Finance and Administration, testified that no territorial consent was given to "AEP" or "Matrix" for temporary electric service for construction purpose ("DT", p.3).

Arlie O. Daniel, "Big Sandy" plant superintendent, testified that he prepared a map (Big Sandy EX.2) showing the location of the Matrix Mine near the mouth of Bear Water Branch, about 4000 feet from "Big Sandy's" distribution line ("DT", p.2-3). "Big Sandy" commenced residential service in the area in January 1955 and has served at least seven coal mines for Beechfork Processing during the last fifteen (15) years ("DT", p.3).

Paul Horn's, "Matrix", mining engineer, hearing testimony changed substantially from his prefiled testimony. At the hearing Horn testified about a "possible" second option of serving the entire "Matrix: mine, i.e. through the Pevler/Czar Substation. Horn testified that "Matrix" "should" be able to use existing poles and lines (Transcript of Evidence [TE], page [p.] 13). Horn further testified that the existing poles and lines were owned by "Czar" (TE, p. 10). Horn also testified that if the Pevler/"Czar" option were employed, then "Czar" would be responsible for payment of the charges for the electric service. Horn did not know if "CZAR" or "Matrix" was responsible for payment of the electric bill under the terms of their "Mining Contract". Horn also did not know if "Matrix" owned any assets other than the mining contract with "Czar".

The "Mining Contract" between "Czar" and "Matrix " is in evidence (Tab 2, Answers of "Matrix" to document request of "Big Sandy"). The contract is for a term of one (1) year and is automatically extended for successive periods of one (1) year so long as coal is mined. Thus, the contract, by its own terms has expired.

Under the contract "Matrix" is granted a non-exclusive right to mine the Czar Coal Complex. "Czar" retains the power to terminate the contract for any reason by giving thirty (30) days written notice. "Matrix" must mine in strict compliance with all applicable state laws and regulation. "Matrix's" has no title to the coal in place or as mined. "Matrix" shall deliver the coal to "Czar" at the mine opening. "Matrix's" consideration is the sum of its normal mining cost plus a redacted amount per ton.

The mining agreement does not grant "Matrix" any rights to use "Czar" electrical infrastructure.

Delinda k. Borden, "AEP" Customer Service Engineer, testified that at the current time there are two (2) different proposals pending for "AEP" to provide electric service to the Matrix Mine. She could not tell "PSC" which proposal would be accepted, because it would have to be studied (TE, p.74). Wagner concurred with this testimony stating that the Pevler/Czar proposal needed more engineering studies (TE, p.78).

ARGUMENT

1. Standing And Real Party Interest

The "Matrix" application should be dismissed because "Matrix" does not have statutory authority to bring the action and/or it is not the real party in interest. The purpose of KRS Chapter 278 is..."to encourage the orderly development of retail electric service... and to minimize disputes between retail electric suppliers..." among other things (KRS 278.016). The chapter does not confer any rights to the customer. If the customer is permitted to

file territory actions, then every time the customer is in the certified territory of the higher rate provider, it will file the action. This is against the public interest of "minimizing disputes between retail electric suppliers". The legislature believed that retail electric suppliers were able to settle territory issues with a minimum of disputes to be resolved by the "PSC". And the legislature believed that the customer would always prefer the low rate provider. Thus, the customer was eliminated from the process.

If the "PSC" adopts a policy (written or unwritten) of permitting the customer to choose the low rate provider, then the public interest, "... to encourage the orderly development of retail electric service...' is violated. As the name indicates the rural electric cooperatives mainly serve the rural areas of the Commonwealth. The rural areas are less dense than the areas served by the IOU (Investor Owned Utilities). If density is defined as the number of customer per mile of electric line, the greater the density the lower the rate. Thus, if the territory dispute is between a rural electric coop and an IOU, the IOU will generally have the low rate and will win.

KRS 278.018 did not create a market place where exclusive territory is bought and sold to the low bidder. But if you bring the customer into the process, he will expect the territory to go to the low bidder.

It is manifestly unfair to take rural electric coops exclusive territory and give it to an IOU when a large load is involved, then criticize the rural electric coop because its rates are not competitive with the IOU.

The legislature, in providing for,"... the orderly development of retail electric service...", needs viable rural electric coops. The citizens of the Commonwealth need viable rural electric coops. The PSC needs viable rural electric coops. "AEP" needs viable rural electric coops. Why ? Because the rural electric coops do the "heavy lifting". The rural electric coops build a mile of line to serve one residential customer. "AEP" doesn't want to do this: no density. "AEP" wants a viable "Big Sandy". Chances are good that "Big Sandy" and "AEP" could have settled this dispute without filing an application with the "PSC". In the past they have settled many territory issues between themselves. They have a good working relationship.

For the purpose of argument, it will be conceded that the customer can bring the action under KRS 278.018. The issue then becomes: Is "Matrix" or is "Czar" the real party in interest. "Matrix" has switched horses in the middle of the stream. "Matrix" has abandoned the "duplication of facilities" theory and has embraced the "existing distribution facilities" theory. This latter theory comes into play because "Matrix" now wants "AEP" to serve the mine from the existing Pevler/ Czar substation. This appears to be an easier burden of proof for "Matrix", except that neither "Matrix" nor "AEP" own any of the existing distribution facilities. "Czar" owns the distribution facilities and no one on behalf of "Czar" has testified in this case. There is no evidence that "Czar" has consented for its distribution facilities to be used to serve the "Matrix" mine. What effect will

the “Matrix” load have on “Czar” ability to provide electricity for its other facilities? The evidence is silent. In fact the evidence is silent on whether “AEP” will provide electric service to the Matrix Mine from the Pelvar/Czar substation.

Paul Horn, who is an employee of Beechfork Processing, testified that if the mine is served from the Pelvar/Czar substation, then “Czar” would be responsible for paying the electric bill. (TE, p.32).

Under the Mining Contract, “Matrix’s” consideration for mining the coal is reimbursement for normal mining cost plus a small per ton override (mining contract, p.4). The evidence does not show that normal mining cost includes the cost of the electric service. The only assets of “matrix” is the “Mining Contract”. This is not a substantial asset. “Matrix” has no economic interest in the coal or no title to the coal in place or as mined (p.4.). “Matrix’s” right to mine the coal is non-exclusive (p.1.) and “Czar” can terminate the contract for any reason whatever, with or without cause, by giving 30 days written notice(p.2).

“Matrix” is a text-book “shell” corporation. It has no assets, no coal, no electrical infrastructure and is not responsible for payment of the electric bill. “Czar” is the real party in interest.

2. Did Matrix Prove Its Case?

If the PSC finds that “AEP” will provide service to the mine by tapping its 69kV Dewey-Inez transmission line as “AEP” alleges in its Response, then “Big Sandy’s” exclusive right to furnish retail electric

service to all customers located within its certified territory should prevail as the .017 (3) criteria is equal.

Under this scenario, either electric provider will have to build a new transmission-distribution facility substantially identical and substantially at the same location. There would not be a duplication of facilities in either certified territory.

Cost per se are not relevant under the .017 (3) criteria. It is only when there is evidence that costs are unreasonable that it becomes relevant. There is no such evidence here.

Also "PSC" should authorize "Big Sandy" to extend its facilities through the certified territory of "AEP", if it is necessary to provide electric service at the bore holes.

3. Did "AEP" Violate KRS 278.018?

KRS 278.018 (1) provides, in effect, that each retail electric supplier shall not furnish, make available, render, or extend its retail electric service to a customer for use in electric-consuming facilities located within the certified territory of another retail electric supplier.

Clearly, "AEP" violated this section when its agent, "Matrix", extended its electric lines from "AEP's" certified territory into "Big Sandy's" certified territory for providing electricity for the construction of the Matrix mine entrance without the consent of "Big Sandy" or authorization from the "PSC".

The "PSC" should order "AEP" to cease and desist in this violation and should impose an appropriate penalty.

CONCLUSION

This "PSC" should dismiss the application as this customer has no standing to bring this action and/or this customer is not the real party interest.

In the alternative the "PSC" should find that the pleadings and the evidence establish that tapping the "AEP" 69kV Dewey-Inez line is the appropriate means to provide retail electric service to the Matrix Mine; that applying the criteria set forth in KRS 278.017 (3) is equal. Therefore, "Big Sandy's" exclusive right to provide retail electric service within its certified territory must prevail. "Big Sandy" shall provide electric service to the Matrix mine facilities, including bore holes.

"AEP" should be enjoined from providing further service to the Matrix Mine and should be penalized for violating KRS 278.018.

Respectfully Submitted,

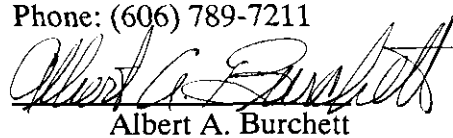
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CERTIFICATE OF SERVICE

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